Filed 7/1/15 Liu v. Bd. of Trustees of the Cal. State Univ. CA1/5

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

WENJIU LIU, Plaintiff and Appellant, v. BOARD OF TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY, Defendant and Respondent.	A142220 (Alameda County Super. Ct. No. HG12643064)

Wenjiu Liu (appellant) appeals following a jury trial on his whistleblower claim against respondent Board of Trustees of the California State University (CSU). We affirm.

BACKGROUND

We recite only the background facts relevant to our resolution of this appeal. Appellant was hired in 2005 as a tenure track assistant professor at CSU. Between June and November 2011, CSU denied appellant tenure and a promotion, suspended him without pay, temporarily banned him from being physically present on campus, and terminated his employment. Appellant contended these were retaliatory actions punishing him for "whistleblower letters" he wrote about CSU administrators. CSU disagreed, concluding after an internal investigation that the adverse employment actions had no connection to appellant's claimed whistleblowing activity and instead were taken

because of appellant's alleged inappropriate, unprofessional, and/or threatening conduct directed at CSU faculty, staff, and/or students.

Appellant sued CSU in 2012.[1] The operative first amended complaint alleges retaliation for whistleblowing activity in violation of Government Code section 8547.12 (section 8547.12).[2] In a special verdict issued at the conclusion of trial, the jury found appellant had not made any protected disclosures for purposes of section 8547.12. Appellant filed motions for a new trial and judgment notwithstanding the verdict, which the trial court denied. This appeal followed.

DISCUSSION

Appellant contends the trial court erred in (1) granting CSU's motion in limine limiting the scope of the alleged whistleblower disclosures, (2) providing certain jury instructions, and (3) denying appellant's post-trial motions.[3] In his reply brief, appellant raises various challenges to CSU's appellate filings. We find no reversible error and affirm the judgment.

I. *Motion in Limine*

A. *Background*

On May 1, 2012, appellant filed an administrative whistleblower complaint with CSU. In this complaint, appellant claimed CSU retaliated against him for writing three specified whistleblower letters.

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[1] Appellant was represented by counsel until shortly before trial, after which point he proceeded in propia persona.

[2] The trial court granted CSU's motion for summary adjudication with respect to additional causes of action alleged in the first amended complaint. Appellant does not challenge this ruling on appeal.

[3] In a section of his brief titled "Statement of the Case," appellant appears to raise additional contentions, including trial court bias and "illegal" conduct by defense counsel. Because these contentions are unsupported by any legal authority or reasoned argument, we decline to consider them. (*Associated Builders and Contractors, Inc. v. San Francisco Airports Com.* (1999) 21 Cal.4th 352, 366, fn. 2 [contention is not properly raised where appellant "fails to provide any analysis or argument in support"].)

On August 15, 2012, appellant filed another letter with CSU. The opening paragraph of the August letter provided, in relevant part, "On May 1, 2012, I submitted a[] [whistleblower] . . . complaint. In my May 1 letter, I only included my whistleblower actions in the more formal form . . . . As I looked at [the] Whistleblower Retaliation Complaint website of the State Person[ne]l Board, . . . my understanding of the whistleblower definition was too narrow. As a matter of fact, retaliations on my protected whistleblower actions go back to 2007 and 2008. In this letter, I discuss retaliations against my whistleblower actions that were not included in [the] May 1, 2012 letter." The August letter went on to identify a number of alleged whistleblowing disclosures and subsequent retaliation by CSU. The last retaliatory act alleged in this letter took place in April 2011.

After conducting an internal investigation, CSU rejected the claims in appellant's May 1, 2012 complaint. CSU refused to accept the August 15, 2012 letter for investigation, apparently because it failed to comply with the time limits for filing an administrative complaint.

Before trial, CSU filed a motion in limine seeking to limit appellant's claim to the disclosures included in his May 1, 2012 administrative complaint on the ground that only these claims were administratively exhausted. At an evidentiary hearing on the motion, appellant testified the May and August letters "are part A and B of one single complaint." During the hearing, the trial court disagreed with this characterization: "I don't read it like that" because the first paragraph of the August letter "sounds to me like you have a new complaint that you want addressed." The trial court granted CSU's motion and limited appellant's claim to the three whistleblower acts identified in the May 1, 2012 letter.

B. *Analysis*[4]

Appellant first contends he should not be required to administratively exhaust his claims. We disagree. Section 8547.12, which governs whistleblower complaints by CSU employees, provides that CSU employees "may file a written complaint" with a manager or other designated CSU officer alleging retaliation for whistleblowing activity, with the proviso that the administrative complaint "shall be filed within 12 months of the most recent act of reprisal complained about." (§ 8547.12, subd. (a).) "[T]he rule of exhaustion of administrative remedies is well established in California jurisprudence . . . . 'In brief, the rule is that where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act.' [Citation.] The rule 'is not a matter of judicial discretion, but is a fundamental rule of procedure . . . binding upon all courts.' " (*Campbell v. Regents of University of California* (2005) 35 Cal.4th 311, 321.) Accordingly, because section 8547.12 provides an administrative remedy for appellant's whistleblower claim, he must exhaust that remedy before seeking relief in court. The sole authority cited by appellant, *Runyon v. Board of Trustees of California State University* (2010) 48 Cal.4th 760 (*Runyon*), is not to the contrary and does not show appellant's case falls within an exception to the administrative exhaustion requirement. (See *Runyon*, *supra*, at p. 775 ["a CSU employee *who has complied with CSU's internal complaint and investigation requirements* and received an adverse decision from CSU may bring a civil action for damages against those allegedly responsible for unlawful retaliation", italics added].)

Appellant next contends the August 15, 2012 letter was an amendment to his May 1, 2012 complaint, rather than a new complaint. His sole authority is *Sanchez v. Standard Brands, Inc.* (5th Cir. 1970) 431 F.2d 455 (*Sanchez*), a case involving a

[4] CSU contends appellant failed to provide a sufficient record for our review because he did not provide us with the reporter's transcript for an earlier hearing at which the trial court apparently stated its reasons for limiting appellant's claims to those that were administratively exhausted. We need not decide CSU's contention because we reject appellant's argument on other grounds.

complaint filed with the federal Equal Employment Opportunity Commission. Appellant relies on the case for the proposition that "procedural ambiguities in the statutory framework" of Title VII of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000e et seq.) should be resolved "in favor of the complaining party." (*Sanchez, supra,* at p. 461.) Section 8547.12, however, is silent as to the procedure for amending an administrative complaint; instead, it contemplates that CSU will create the procedures for handling such complaints. (*Runyon, supra,* 48 Cal.4th at p. 764, fn. 2 ["Section 8547.12 requires CSU to create a procedure for receiving and resolving complaints by employees or applicants for employment alleging retaliation for making protected disclosures."].)

The court in *Sanchez,* to determine whether the plaintiff's amendment to her administrative complaint was proper, relied on administrative regulations governing amendments. (*Sanchez, supra,* 431 F.2d at pp. 461–462.) Similarly, CSU has issued an executive order setting forth the procedure for the administrative investigation of whistleblower complaints. (CSU Exec. Order No. 1058.) This executive order provides, with respect to amendments to complaints, "If the complainant raises any new allegations after the complaint has been accepted, the campus administrator shall decide whether to include those allegations as part of the complaint. If they are not included as part of the initial complaint, the complainant must file a new complaint to address those allegations." (*Id.* at p. 3.) Appellant has not referred to this provision or argued that it should not govern his August 15, 2012 letter, which CSU declined to include as part of his May 1, 2012 complaint. Accordingly, *Sanchez*—the sole authority cited by appellant in support of this argument—does not demonstrate the trial court erred.

Appellant's final contention with respect to the motion in limine is that the permissible scope of his judicial complaint should encompass anything that could reasonably be expected to grow out of CSU's investigation. He contends CSU's investigation included a review of whistleblower conduct "*not listed* in the May 1 and August 15, 201[2] letters." (Italics added.) However, in the sole record of proceedings on this motion provided to us by appellant—the reporter's transcript of the March 14, 2014 evidentiary hearing—appellant argued only that the claims raised in his August 15,

2012 letter should be permitted, not that additional claims not included in either of his letters should be. Accordingly, we decline to consider this argument. (*Ochoa v. Pacific Gas & Electric Co.* (1998) 61 Cal.App.4th 1480, 1488, fn. 3 ["It is axiomatic that arguments not asserted below are waived and will not be considered for the first time on appeal."].)

II. *Jury Instructions*

Appellant raises a number of challenges to the jury instructions regarding protected disclosures. Specifically, appellant challenges the trial court's instructions that: reporting of publicly known facts is not a protected disclosure (appellant also challenges the trial court's response to a jury question during deliberations seeking clarification of the term "publicly known facts"), reporting to a supervisor the supervisor's own wrongdoing is not a protected disclosure, and the disclosure must be made to a person in a position to remedy the perceived violation.

Appellant has not demonstrated the instructions were erroneous. (See *Mize-Kurzman v. Marin Community College Dist.* (2012) 202 Cal.App.4th 832, 858–859 (*Mize-Kurzman*) [interpreting "protected disclosures" for purposes of community college employee whistleblower statute to exclude publicly known facts and reports of wrongdoing made to the alleged wrongdoer, and finding the purpose of California's whistleblower laws is "to encourage disclosure of wrongdoing to persons who may be in a position to act to remedy it"].) We decline appellant's invitation to create "new laws" contrary to this precedent.

Moreover, even if the instructions were erroneous, appellant has failed to demonstrate prejudice. "A judgment may not be reversed for instructional error in a civil case 'unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.' " (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 580.) "Instructional error in a civil case is prejudicial 'where it seems probable' that the error 'prejudicially affected the verdict.' " (*Ibid.*) This analysis includes evaluation of "(1) the state of the

evidence, (2) the effect of other instructions, (3) the effect of counsel's arguments, and (4) any indications by the jury itself that it was misled." (*Id.* at pp. 580–581.)

We are unable to evaluate the state of the evidence because appellant has provided us with an insufficient record of the trial—he has not supplied us with reporter's transcripts for *any* trial testimony.[5] In the absence of a sufficient record, we presume any error was not prejudicial. (*Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 136 [it is appellant's "burden . . . to provide a record sufficient to determine whether the result would have been different in the absence of error"]; see *Stasz v. Eisenberg* (2010) 190 Cal.App.4th 1032, 1039 [it is appellant's "obligation . . . to present a complete record for appellate review, and in the absence of a required reporter's transcript and other documents, we presume the judgment is correct"].) We note that during closing arguments when CSU's counsel argued appellant had not made protected disclosures, he did not rely on the publicly known nature of the disclosures or on who the disclosures were made to. Instead, CSU's counsel argued the disclosures were not protected pursuant to a different instruction—not challenged by appellant on appeal—that debatable differences of opinion and policy are not protected disclosures unless the defendant reasonably believes the challenged policy violates a statute or regulation. (See *Mize-Kurzman, supra,* 202 Cal.App.4th at p. 854.)

III. *Motion for Judgment Notwithstanding the Verdict*

Appellant challenges the trial court's denial of his post-trial motion for judgment notwithstanding the verdict, arguing that no reasonable jury could conclude appellant did not make protected disclosures.

"On appeal from the denial of a motion for JNOV, we determine whether there is any substantial evidence, contradicted or uncontradicted, supporting the jury's verdict." (*Jones & Matson v. Hall* (2007) 155 Cal.App.4th 1596, 1607.) As noted above, appellant has failed to provide us with a sufficient record of the evidence at trial. "Where no

[5] Even if we consider excerpted reporter's transcripts filed as exhibits to appellant's post-trial motions, the record on appeal includes the testimony of only one witness out of the approximately twenty who testified at trial.

reporter's transcript has been provided and no error is apparent on the face of the existing appellate record, the judgment must be *conclusively presumed correct* as to *all evidentiary matters*. To put it another way, it is presumed that the unreported trial testimony would demonstrate the absence of error. [Citation.] The effect of this rule is that an appellant who attacks a judgment but supplies no reporter's transcript will be precluded from raising an argument as to the sufficiency of the evidence." (*Estate of Fain* (1999) 75 Cal.App.4th 973, 992.) Because, in the absence of a sufficient record, we must presume the missing record would demonstrate the absence of error, we affirm the trial court's denial of appellant's motion for judgment notwithstanding the verdict.

IV. *New Trial Motion*

Appellant moved for a new trial on a number of grounds, including juror bias and misconduct. Appellant supported his claim of juror bias and misconduct with his own declaration reporting statements jurors allegedly made to him.

At the hearing on appellant's post-trial motions, the trial court unequivocally rejected all of appellant's arguments for a new trial except the claim of juror bias and misconduct, stating, "I can tell you that I completely disagree with Nos. 1 through 5 [asserted grounds other than juror bias and misconduct]. I'll not grant you a new trial on those grounds." With respect to the claim of juror bias and misconduct, the trial court found appellant's evidence inadmissible hearsay, but continued the hearing to permit appellant to either subpoena jurors or bring declarations from jurors to support his claim of bias and misconduct. However, the trial court reiterated that this was the only ground on which he might grant a new trial: "I will not grant you a new trial unless there's evidence of bias by the jury that's an illegal bias or there's evidence of jury misconduct."

Prior to the continued hearing date, CSU moved to quash appellant's subpoenas to two jurors. After hearing argument, the trial court granted CSU's motion to quash as to one juror, but denied it as to the second. Shortly after this ruling, the following exchange took place:

"[Appellant]: I think this case has so many blunders, and sooner or later a new trial should be ordered for the inefficiency of the whole California judicial system. [¶] And

more importantly, make this decision for new trial today now, based on other strong grounds, such as 999 -- 909, which is the former complaints, which was excluded from the trial --

"The Court: Are you asking me to make a ruling on your new trial motion today?

[Appellant]: No -- yes, yes. I wish -- yes, I wish you could just order there is a new trial so --

"The Court: Based on what I know at this point in time, you're asking me to make an order regarding your new trial motion?

"[Appellant]: Yes.

"The Court: Am I understanding that correctly?

"[Appellant]: Yes, based on other grounds."

The trial court proceeded to orally deny the motion, and subsequently issued a written order explaining it had ruled "[a]fter clarifying that [appellant] really wanted the court to make its ruling on the motion for new trial immediately on the record before the court without waiting until the . . . further hearing."

Appellant's only argument on appeal is this ruling deprived him of the right to a full hearing on juror bias and misconduct. We disagree. Appellant had no right to subpoena jurors on this issue; to the contrary, he was precluded from doing so. Our Supreme Court has held, "in civil cases a motion for a new trial based on allegations of jury misconduct must be presented solely by affidavit, without the testimony of witnesses. We based our holding on Code of Civil Procedure section 658, which provides that a motion for a new trial based on alleged jury misconduct 'must be made upon affidavits,' thus precluding the use of other types of evidence." (*People v. Hedgecock* (1990) 51 Cal.3d 395, 414.) The trial court did not abuse its discretion by ruling that the statements in appellant's declaration on this issue were inadmissible hearsay. (*Barboni v. Tuomi* (2012) 210 Cal.App.4th 340, 345 ["The trial court must undertake a three-step process to evaluate a motion for new trial based on juror misconduct. The trial court must first 'determine whether the affidavits supporting the motion are admissible. [Citation.]' [Citation.] This, like any issue of admissibility, we

review for abuse of discretion."].) The trial court's denial of appellant's new trial motion based on juror bias and misconduct was proper and did not deprive appellant of a fair hearing on the issue.

V. *Additional Issues*

In his reply brief, appellant urges us to disregard CSU's response brief because it failed to comply with court rules on cover colors and binding. We exercise our discretion to disregard any technical noncompliance. (Cal. Rules of Court, rule 8.204(e)(2)(C).)[6]

Appellant challenges certain trial exhibits submitted by CSU with a motion to augment the record, as well as the characterization of certain background facts in CSU's response brief. We need not decide these contentions because consideration of the trial exhibits and the challenged factual statements were not necessary to decide this appeal.[7]

Finally, appellant asks us to sanction counsel for CSU. Appellant's separate motions for sanctions were not timely filed and are therefore denied. (Cal. Rules of Court, rule 8.276; *Kajima Engineering and Construction, Inc. v. Pacific Bell* (2002) 103 Cal.App.4th 1397, 1402 [denying procedurally improper sanctions request].)

DISPOSITION

The judgment is affirmed. Respondent shall recover its costs on appeal.

[6] Appellant also argues CSU "clearly fabricated" the reasons it needed an extension of time to file its brief. We disagree with appellant's contention and, in any event, appellant cites no authority to support his apparent argument that any impropriety in an extension of time request—which was granted by this court—requires us to disregard the subsequently-filed brief.

[7] Accordingly, we deny as moot appellant's motion to exclude these trial exhibits filed June 1, 2015. We also deny as moot appellant's June 1, 2015 motion to expedite his appeal.

SIMONS, Acting P. J.

We concur.

NEEDHAM, J.

BRUINIERS, J.

(A142220)